IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEJITA ROMAN MARCIA[1]	:	CIVIL ACTION
v.	:	
CHARLES MICEWSKI, et al.	:	NO. 97-5379

MEMORANDUM OF DECISION

THOMAS J. RUETER
United States Magistrate Judge

August 24, 1998

I. INTRODUCTION

Presently before the court is defendants' motion for summary judgment. (Document No. 15.) Plaintiff's lawsuit arises out of her arrest on August 25, 1995. In her complaint, plaintiff alleges that, at all relevant times, defendants Charles Micewski, Mark Itzko, Joseph Schrank, and Walter Davis were agents for the Pennsylvania Attorney General's Bureau of Narcotics Investigations (collectively, the "Agents") (Complaint at ¶2), and defendant John Sunderhauf was the "Zone Commander of the Philadelphia Region of the Attorney General of Pennsylvania's Bureau of Narcotics Investigations and Drug Control". (Complaint at ¶3).[2] The complaint is brought pursuant to 42 U.S.C. §§1983 and 1985 and alleges violations of the First, Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution. (Complaint ¶¶4, 19, 20,

[1] Although the Complaint identifies plaintiff as "Alejita Roman Marcia" (Document No. 1), she stated at her deposition that her last name is actually "Garcia".

[2] The Complaint also named Robert Grous as a defendant. Mr. Grous was never served and the Court dismissed all claims against him by Order dated January 12, 1998. (Document No. 9.)

24.) The complaint also alleges a claim of malicious prosecution under state law (Count III), and requests an award of attorneys' fees (Count II) and punitive damages (Count IV).

The defendants are sued in their individual as well as official capacities. Plaintiff alleges that the defendant Agents "were engaged in a joint venture" and "assisted each other in performing the various actions" described by plaintiff in her complaint. (Complaint at ¶16.) For all the following reasons, defendants' motion for summary judgment shall be granted.

II. FACTUAL BACKGROUND

The undisputed facts in this case are as follows.[3] On August 21, 1995, defendant Micewski received information from an informant that heroin sold at Cambria and Mutter Streets in North Philadelphia, and stamped "ATNT" was being stored at a house at 2906 N. Mutter Street. (Micewski Decl. Ex. 1.) On August 24, 1995, defendant Micewski witnessed a transaction during which a man entered 2906 N. Mutter Street and exited with blue colored packets that he handed to a "buyer". Id. The buyer left in a car with two other people. Defendant Micewski stopped the car and found in the possession of the buyer ten blue glassine packets stamped "ATNT" , the contents of which field tested positive for heroin. Id. The following day, defendant Micewski applied for a search warrant for 2906 N. Mutter Street. The warrant was issued by Municipal Court Judge Louis G.F. Retacco on August 25, 1995. (Defs.' Req. for Admissions Ex. 5.) Plaintiff does not contend that the search warrant was obtained improperly.

[3] The recitation of facts is taken primarily from defendants' memorandum of law in support of their motion for summary judgment. It is consistent with plaintiff's version of the facts. (Defs.' Mem. of Law Supp. Summ. J. at 2-8.)

At around 11:00 a.m. on August 25, 1995, defendant Micewski, and the other Agents, went to 2906 N. Mutter Street to execute the search warrant. (Pl.'s Dep. at 63-65, 79, 80; Complaint at ¶9; Micewski Decl. at ¶7.) Upon entry, defendant Micewski found plaintiff sitting on a chair to the right of the door and two other women seated on a couch in the same room. (Pl.'s Dep. at 59-63; Micewski Decl. at ¶9.) The chair upon which plaintiff was seated was wooden and had a seat cushion and a back cushion. (Pl.'s Dep. at 61-63; Micewski Decl. at ¶10.) At defendant Micewski's request, plaintiff rose from the seat and Micewski found two wrapped packages each containing large numbers of blue tinted glassine packets stamped "ATNT" containing an off-white powder. (Pl.'s Dep. at 65, 66-69, 71, 72; Micewski Decl. at ¶¶10, 11, Ex. 3, 4.) The packets that defendant Micewski found under the chair on which plaintiff was sitting were identical in appearance to the ones he had seen sold at 2906 N. Mutter Street the previous day, the contents of which had tested positive for heroin. (Micewski Decl. at ¶11.)

Defendant Micewski also found under the seat cushion of plaintiff's chair $351.00 in cash (8 twenties, 9 tens, 17 fives, and 16 ones) and a paper containing names and numbers. (Pl.'s Dep. at 75; Micewski Decl. at ¶12, Ex. 5.) On a table in the same room, defendant Micewski found a purse containing plaintiff's welfare card and $480.00 in cash (22 tens, 37 fives, and 75 ones). (Pl.'s Dep. at 54, 66, 70, 71; Micewski Decl. at ¶13.) Defendant Micewski knew that at that time in that area, heroin sold at $10.00 per bag. (Micewski Decl. at ¶5.) Defendant Micewski found at the premises a letter from Bell Atlantic addressed to Natividad Quiala, one of the other women defendant Micewski found at 2906 N. Mutter Street. Ms. Quiala identified herself as the resident of the house.

The defendants arrested Ms. Quiala and plaintiff, and they were taken to the Task Force Office. (Pl.'s Dep. at 78-80, 85, 86; Micewski Decl. at ¶16.) At the Task Force Office, the substance inside some of the blue packets field tested positive for heroin. (Micewski Decl. at ¶18.) In total, the two wrapped packages found under the seat cushion of the chair on which plaintiff was seated contained 92 packets of heroin with a street value of $920. (Micewski Decl. at ¶¶5, 19.) On September 27, 1995, the Pennsylvania State Police Laboratory reported that the contents of the blue packets seized by defendant Micewski at 2906 N. Mutter Street were heroin. (Req. for Admissions at 15-16, Ex. 6.)

Next, plaintiff was taken to the Philadelphia Police Administration Building. (Pl.'s Dep. at 86-87.) On August 26, 1995, the District Attorney filed a criminal complaint charging plaintiff with knowing and intentional possession of a controlled substance; possession of a controlled substance with intent to deliver; and conspiracy, all in violation of Pennsylvania law. (Req. for Admissions at 1-3, Ex. 1.) At 6:00 a.m. on August 26, 1995, a preliminary arraignment was held pursuant to Pa. R. Crim. P. 140 at which the charges were presented to plaintiff. Plaintiff signed her own bond and she was immediately released; plaintiff was not required to post any cash or other security. (Req. for Admissions at 4-7, Ex. 2; Pl.'s Dep. at 8, 90-92.) The only condition of the bond was that plaintiff appear in court as required to defend the charges. The terms of plaintiff's release did not change prior to the disposition of the charges. (Req. for Admissions at 2, 8-9.)

On November 27, 1995, a preliminary hearing was held for plaintiff and Ms. Quiala at which defendant Micewski testified. (Req. for Admissions at 10, Ex. 3.) Plaintiff was held for court on the charges of knowing and intentional possession of a controlled substance and

possession with intent to deliver. Id. Plaintiff's bail remained unchanged. On December 11, 1995, the District Attorney filed informations against plaintiff on these charges. (Req. for Admissions at 11-13, Ex. 4a and 4b.) On April 12, 1996, before the charges came to trial, the District Attorney nolle prossed them. Id. (Pl.'s Dep. at 99.)

Plaintiff argues that defendant Micewski, and the other Agents, arrested her without probable cause in violation of her rights under state and federal laws. Plaintiff contends that she was visiting 2906 N. Mutter Street in order to clean the house. (Pl.'s Dep. at 34, 54.) Plaintiff claims that she did not know the drugs and other items were under the chair cushion (Pl.'s Dep. at 66, 71), and she stood next to the chair while defendant Micewski searched it. (Micewski Dep. at 38.) Defendant Micewski could not see the drugs or other items until he removed the seat cushion. Id. No drugs or money were found on plaintiff's person. Plaintiff maintains that she intended to use the money found in her purse to pay the utility bills also found in her purse. (Pl.'s Dep. at 54, 66, 71, 106-07.)

Plaintiff further argues that she was charged with the crimes as a result of a misleading Complaint Fact Sheet prepared by defendant Micewski and submitted to the District Attorney listing plaintiff as the defendant and stating that "proof of residence" and "tally work" were taken from the premises indicating that plaintiff was the resident of 2906 N. Mutter Street. (Pl.'s Mem. of Law Opp. Summ. J. at 6.) Plaintiff also contends that she was held on the charges because defendant Micewski gave false testimony at her November 27, 1995 preliminary hearing. Id. Plaintiff claims that Micewski falsely testified on direct examination at that hearing that the heroin packets, tally work and monies were found directly underneath plaintiff, not underneath the seat cushion. Id.

III. DISCUSSION

A. Standard for Summary Judgment.

Fed. R. Civ. P. 56(c) provides that summary judgment shall be properly granted if "the pleadings, depositions, answers to interrogatories, and admissions, on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the burden of showing "that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party sustains its burden, the non-moving party must then "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992). The "non-moving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact," Pastore v. Bell Tel. Co. of Pennsylvania, 24 F.3d 508, 511 (3d Cir. 1994), or replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. In assessing whether the non-moving party has met its burden, the court must focus on both the genuineness and the materiality of the factual issues raised by the non-movant. An issue is "genuine" only if there is sufficient evidence from which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). As to materiality, "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Id. at 248. A factual dispute is only "material" if it might affect the outcome of the case. See id. A dispute over irrelevant or unnecessary facts will not preclude summary judgment. Id.

When considering a motion for summary judgment, "inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Pastore, 24 F.3d at 512. The court may not make credibility determinations or weigh the evidence. Anderson, 477 U.S. at 252. If the record thus construed could not lead the trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushia Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. Plaintiff's Claims Against Each Defendant in His Official Capacity.

Plaintiff has sued each defendant in his individual as well as official capacity. Defendants argue in their motion for summary judgment that they are not subject to suit in their official capacities under 42 U.S.C. §§1983 or 1985. In her response, plaintiff does not appear to dispute this argument but, rather, argues that defendants are also sued in their individual capacities. (Pl.'s Resp. to Defs.' Mot. at ¶1; Pl.'s Mem. of Law Opp. Summ. J. at 8-9.) This court finds independently that defendants cannot be sued in their official capacities under 42 U.S.C. §§1983 or 1985.

The Supreme Court has held that state agencies and state employees in their official capacities are not "persons" subject to actions under §1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 70-71 (1989). See also Jones v. Horn, 1998 WL 297636, at *3 n.3 (E.D. Pa. June 4, 1998) ("Persons acting in their official capacity are not persons subject to suit under 42 U.S.C. §1983.") This holding also applies to 42 U.S.C. §1985. Wright v. Philadelphia Housing Auth., 1994 WL 597716, at *2 (E.D. Pa. Nov. 1, 1994). See also Rode v. Dellarciprete,

617 F.Supp. 721, 723 n.2 (M.D. Pa. 1985) (The definition of "person" is the same for Section 1983 and Section 1985.)

In the instant matter, at the time of plaintiff's arrest, defendants Micewski and Sunderhauf were employees of the Commonwealth of Pennsylvania. Defendants Davis, Schrank, and Itzko were Philadelphia Police Officers assigned to the Office of the Attorney General. According to defendants, under the agreement between the Office of Attorney General and the City and under state law, for purposes of allocating liability these officers were employees of the Commonwealth. Affidavit of James A. Caggiano (attached to Defs.' Mem. of Law Supp. Summ. J.) and 42 Pa. Cons. Stat. Ann. §8953(d). The Office of the Attorney General was an administrative department of the Commonwealth. 71 Pa. Cons. Stat. Ann. §§61, 732-201. Consequently, judgment must be entered against plaintiff and in favor of all defendants in their official capacities.

C. First Amendment, Fifth Amendment and §1985 Claims.

In her complaint, plaintiff alleges that the defendant Agents violated her First Amendment and Fifth Amendment rights, as well as 42 U.S.C. §1985. Defendants argue in their motion that nothing in the complaint or the summary judgment record supports these claims. Plaintiff does not attempt to support these claims in her summary judgment response. Consequently, summary judgment will be entered in favor of the Agents and against plaintiff on her First Amendment, Fifth Amendment and §1985 claims.

This court finds independently that defendants' motion should be granted with respect to these claims. The First Amendment protects a person's right to the free exercise of religion and speech, and the right of assembly. U.S. Const. amend. I. The Fifth Amendment

applies to the federal government and its officials, some provisions of which are applicable to the states through the Fourteenth Amendment's due process clause. Nothing in the complaint or the summary judgment materials alleges any facts that would support claims that the defendant Agents violated these Amendments. Consequently, judgment will be entered in favor of defendants and against plaintiff on these claims.

Plaintiff also alleges that the Agents' actions violated 42 U.S.C. § 1985. Section 1985 authorizes an "action for the recovery of damages" against "two or more persons" who conspire to (1) prevent federal officers from performing their duties, 42 U.S.C. §1985(1); (2) intimidate parties, witnesses or jurors in federal cases (or in state cases where the conspiracy is motivated by an intent to deny equal protection), 42 U.S.C. §1985(2); or (3) deprive other persons of equal protection of the laws, 42 U.S.C. §1985(3). Plaintiff alleges no facts and presents no evidence that would support a claim under §§1985(1) or (2). If plaintiff alleges any §1985 claim, it would be under subsection (3). A claim under §1985(3), however, requires that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action". United Bhd. of Carpenters and Joiners of Am. v. Scott, 463 U.S. 825, 834 (1983) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). See also Bedford v. Southeastern Pennsylvania Transp. Auth., 867 F.Supp. 288, 294 (E.D. Pa. 1994) (same). Plaintiff has not pled any class-based discriminatory animus as the motivation of defendants' actions, nor presented any evidence that would support such a claim. Consequently, judgment is entered in favor of defendants and against plaintiff on her claim under 42 U.S.C. §1985.

D. Fourteenth Amendment Claim.

Plaintiff alleges in her complaint that the defendants violated her Fourteenth Amendment rights. (Complaint at ¶¶4, 20.) Plaintiff claims that the defendant Agents arrested her without probable cause and maliciously caused the institution of criminal charges against her. Defendants argue that plaintiff must pursue these claims under the Fourth Amendment, not the Fourteenth Amendment and, therefore, their motion must be granted with respect to plaintiff's Fourteenth Amendment claim. In her response to defendants' motion, plaintiff does not defend her Fourteenth Amendment claim. Consequently, judgment will be entered in favor of defendants and against plaintiff with respect to the Fourteenth Amendment claim.

This court independently finds that defendants' motion must be granted with respect to plaintiff's Fourteenth Amendment claim. In Albright v. Oliver, 510 U.S. 266, 271, 274 (1994), the Court held that the petitioner's claim in that case, i.e., the respondents' actions "infringed his substantive due process right to be free of prosecution without probable cause", presented a claim under the Fourth Amendment, not the Fourteenth Amendment. The Supreme Court clearly stated that there is no Fourteenth Amendment right to be free from malicious prosecution, however, it did not foreclose the possibility that a malicious prosecution claim could be brought under the Fourth Amendment. Id. at 269-71. The Third Circuit Court of Appeals in Mosely v. Wilson, 102 F.3d 85, 94-95 (3d Cir. 1996) considered a §1983 claim alleging use of excessive force and arrest without probable cause to be one implicating the Fourth Amendment. See also Singer v. Fulton County Sheriff, 63 F.3d 110, 114 (2d Cir. 1995) (The Fourth Amendment, not the Fourteenth Amendment, will support a federal claim for malicious prosecution.), cert. denied, 517 U.S. 1189 (1996); Merrero v. Micewski, 1998 WL 414724, at *5-

6 (E.D. Pa., July 22, 1998) (same). Consequently, judgment will be entered in favor of defendants and against plaintiff with respect to plaintiff's claim under the Fourteenth Amendment.

E. Supervisor Liability.

Plaintiff alleges that defendant Sunderhauf, in his individual capacity as the defendant Agents' supervisor, is liable under 42 U.S.C. §1983 for the wrongful acts of the Agents. In Sample v. Dicks, 885 F.2d 1099, 1118 (3d Cir. 1989), the Third Circuit held that "a 'person' is not the 'moving force' [behind] the constitutional violation' of a subordinate, unless that 'person' ... has exhibited deliberate indifference to the plight of the person deprived." To hold a supervisor liable under §1983, the plaintiff must: 1) identify with particularity what the supervisory official failed to do that demonstrates his deliberate indifference; and 2) demonstrate a close causal relationship between the identified deficiency and the ultimate injury. Id. at 1118 (citing City of Canton v. Harris, 489 U.S. 378, 389-90, 392 (1989)). See also Hawkins v. Micewski, 1998 WL 51290, at *2 (E.D. Pa. Jan. 6, 1998) and Torres v. McLaughlin, 1996 WL 680274, at *8 (E.D. Pa. Nov. 21, 1996) (same, both quoting Kis v. County of Schuylkill, 866 F.Supp. 1462, 1474 (E.D. Pa. 1994)).

A plaintiff may also demonstrate supervisory liability by showing that the supervisor had personal involvement in the alleged wrongs; "liability cannot be predicated solely on the operation of respondeat superior." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). See also Rizzo v. Goode, 423 U.S. 362, 377 (1976) (same). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with

appropriate particularity." Id. See also Hawkins, 1998 WL 51290, at *2 and *2 n.4 (citing Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995)) (same). The Third Circuit recently restated this general principle as follows: "Where a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor 'acquiesced' in (i.e., tacitly assented to or accepted) the subordinate's conduct." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1294 (3d Cir. 1997) (footnote omitted).

In the instant matter, plaintiff alleges the following regarding Sunderhauf in his Complaint:

> 17. Defendant John Sunderhauf, knew or should have know [sic] that Defendant agents [sic] conduct of arresting innocent citizens without proper legal basis to justify such acts. The Defendant John Sunderhauf had actual and/or constructive notice that Defendant agents routinely made wanton, malicious, and improper arrests. Despite this actual and/or constructive notice, Defendant Sunderhauf failed to act accordingly to correct said actions and protect the Constitutional rights of private citizens against such police action.
>
> 21. Defendant John Sunderhauf failed to properly investigate the circumstances regarding arrests made by agents in the Bureau of Narcotics Investigations, including Defendant Agents, thereby causing and encouraging said agents to engage in unlawful conduct.
>
> 22. Defendant John Sunderhauf, failed to sanction or discipline agents of the Bureau of Narcotics Investigations, including defendant Agents, for making arrests without probable cause or legal justification, thereby causing or encouraging said agents to engage in unlawful conduct.

(Complaint ¶¶ 17, 21, 22.) In her response to defendants' motion for summary judgment, plaintiff argues that defendant Sunderhauf stated in a deposition taken on January 9, 1997 with respect to another lawsuit, Torres v. McLaughlin, 97-CV-5865, that Sunderhauf became aware in May of 1995 that the Philadelphia District Attorney's office would begin an investigation of

several Bureau of Narcotics Investigations cases. (Pl.'s Resp. to Mot. Summ. J. at 16-17 and Ex. A.) Plaintiff also asserts that in May of 1995 Sunderhauf received a memorandum listing several cases that the District Attorney wanted to review and that defendant Micewski was an officer involved in at least four of those cases. Id. Plaintiff claims that this evidence demonstrates that Sunderhauf became aware of the District Attorney's investigation into defendant Micewski's cases three months before the plaintiff was arrested, and that he failed to "investigate, train, sanction, or discipline" Micewski, creating a substantial risk that Micewski would continue to violate the rights of other citizens. Id. at 17.

After careful review of Sunderhauf's deposition transcript (Pl.'s Resp. to Mot. for Summ. J. Ex. A), this court concludes that Sunderhauf's testimony does not support plaintiff's argument. Sunderhauf does not specifically identify defendant Micewski as an agent involved in the cases being investigated by the District Attorney. On page 93 of the deposition[4], Sunderhauf was asked for each case to name "the agent or agents involved." (Pl.'s Resp. to Mot. for Summ. J. Ex. A at 93.) Sunderhauf identified several agents, but did not name Micewski. The evidence offered by plaintiff, therefore, does not show that Sunderhauf knew that Micewski was acting improperly. See also Sunderhauf Declaration at ¶¶5, 6.[5] Consequently, this court finds that judgment should be entered in favor of defendant Sunderhauf and against plaintiff with respect to her claims against Sunderhauf.

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[4] Plaintiff did not submit a complete copy of the deposition transcript.

[5] Plaintiff also submits as part of her response to defendants' motion, a memorandum to John T. Kelly, Regional Director from the Office of Attorney General dated September 30, 1996, sent via electronic mail on October 1, 1996, which stated that Micewski, among others was not to be a witness, complainant, or affiant. Sunderhauf no longer held the position of Regional Director after May 20, 1996. (Sunderhauf Decl. at ¶1.)

F. Fourth Amendment Claims.

Plaintiff presents two claims under the Fourth Amendment: (1) malicious prosecution, i.e. institution of criminal charges without probable cause; and (2) arrest without probable cause. (Complaint at ¶¶10, 12, 15, 19, and 20.)

a. Malicious Prosecution. Plaintiff's malicious prosecution claim arises from her allegations that defendant Micewski prepared a misleading report for the District Attorney and gave false testimony at plaintiff's preliminary hearing.[6] (Pl.'s Resp. to Mot. for Summ. J. at 11-12.) In particular, plaintiff contends that Micewski listed her welfare card on the Complaint Fact Record submitted to the District Attorney as proof that plaintiff resided at 2906 Mutter Street, and falsely testified at her preliminary hearing that the cocaine packets and tally work were found directly underneath plaintiff's buttocks, as opposed to underneath the chair cushion. Id. at 6.

Defendants argue that defendant Micewski is immune from all claims arising out of his testimony at the preliminary hearing, and that no Fourth Amendment claims arise out of the initiation of the prosecution against plaintiff because the initiation of charges did not cause a seizure of plaintiff.

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[6] In addition to the elements necessary to establish a claim under §1983, i.e. deprivation of rights secured by the United States Constitution and defendants were acting under the color of state law, a plaintiff alleging malicious prosecution must also show that "(1) the defendant initiated a criminal proceeding, (2) which ended in plaintiff's favor, and (3) which was initiated without probable cause, and that (4) the defendant acted with actual malicious purpose or for a purpose other than bringing the defendant to justice." Torres v. McLaughlin, 1996 WL 680274, at *6 (E.D. Pa. Nov. 21, 1996). See also Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996) (same). "Actual malice in the context of malicious prosecution is defined as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." Lee v. Mihalich, 847 F.2d 66, 70 (3d Cir. 1988).

1. Micewski is Absolutely Immune from Claims Arising Out of Alleged Perjured Testimony. In Briscoe v. LaHue, 460 U.S. 325 (1983), the Supreme Court held that police officers are entitled to absolute immunity from claims under §1983 for giving perjured testimony at trial. The Supreme Court concluded that

> [a] police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury.

Id. at 342. Section 1983, the Court explained, "did not abrogate the absolute immunity existing at common law." Id. at 334. The Court declined to decide whether immunity applies for perjured testimony at pretrial proceedings. Id. at 328 n.5. The Third Circuit Court of Appeals extended this protection to pretrial proceedings in Williams v. Hepting, 844 F.2d 138, 140-41 (3d Cir.), cert. denied, 488 U.S. 851 (1988). In Williams, the plaintiff alleged that a witness gave perjured testimony at the preliminary hearing, suppression hearings, and trial. The Court of Appeals reviewed the policy arguments supporting common law witness immunity and concluded that they "support the extension of the absolute immunity doctrine to a witness at the pretrial stage of the judicial process." Id. See also Kulwicki v. Dawson, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992) (same); McArdle v. Tronetti, 961 F.2d 1083, 1085 (3d Cir. 1992) (same); Torres, 1996 WL 680274, at * 7 (same).

Plaintiff, however, like the plaintiff in Torres, argues that under Malley v. Briggs, 475 U.S. 335 (1986), and the Second Circuit's interpretation of that decision in White v. Frank, 855 F.2d 956 (2d Cir. 1988), Micewski was a complaining witness at his preliminary hearing and

thus is not entitled to absolute immunity.[7] Complaining witnesses have generally not been afforded immunity under the common law. Our Court of Appeals reconciled Briscoe and Malley as follows:

> In Malley, the Supreme Court noted, in the context of rejecting immunity for a police officer's baseless application for an arrest warrant, that complaining witnesses were not afforded immunity at common law. The Court was not addressing the issue of testimony at trial, as it did in Briscoe. We decline to interpret the language in Malley as overriding the broad witness protection announced in Briscoe.

Kulwicki, 969 F.2d at 1467 n.16. Consequently, this court rejects plaintiff's argument and finds that Micewski is absolutely immune from suit under §1983 for any alleged false testimony he may have given at plaintiff's preliminary hearing.

2. Initiation of Prosecution Protected by Fourth Amendment When a "Seizure" Results. Plaintiff alleges that Micewski, and the other defendant Agents, unlawfully arrested her and caused false criminal charges to be filed against plaintiff. Plaintiff claims that misleading statements Micewski placed in the Complaint Fact Record caused the District Attorney to file charges against her. (Pl.'s Resp. to Mot. for Summ. J. at 11.) Defendants argue that the institution of criminal charges is "not an event of constitutional significance." (Defs.' Mem. of Law Supp. Mot. for Summ. J. at 18.) Defendants cite to Gerstein v. Pugh, 420 U.S. 103, 119 (1975) for the proposition that "the initiation of the criminal process, by itself, is not subject to constitutional standards or judicial oversight." Id.

[7] Plaintiff contends that Micewski was a complaining witness at her preliminary hearing because his false testimony caused the prosecution against plaintiff to go forward. (Pl.'s Resp. to Mot. for Summ. J. at 11-12.)

In Albright, the Court recognized that malicious prosecution under §1983 is actionable under the Fourth Amendment. 510 U.S. at 270-71 n.4. An individual can be liable for malicious prosecution if he "fail[s] to disclose exculpatory evidence to prosecutors, make[s] false or misleading reports to the prosecutor, omit[s] material information from the reports, or otherwise interfere[s] with the prosecutor's ability to exercise independent judgment" in deciding whether to prosecute. Torres v. McLaughlin, 966 F.Supp. 1353, 1364 (E.D. Pa. 1997) (citing Rhodes v. Smithers, 939 F.Supp. 1256, 1273 (S.D.W.Va. 1995), aff'd, 91 F.3d 132 (4th Cir. 1996)). By contrast, where a police officer "presents all relevant probable cause evidence to an intermediary, such as a prosecutor, ..., the intermediary's independent decision to seek a warrant, ..., or to return an indictment breaks the causal chain and insulates the officer from a section 1983 claim based on lack of probable cause for an arrest or prosecution." Rhodes, 939 F.Supp. at 1274. See also Merrero v. Micewski, 1998 WL 414274, at *6 (E.D. Pa. July 22, 1998) ("A police officer may only be held to have 'initiated' a criminal proceeding if he knowingly provided false information to the prosecutor or otherwise interfered with the prosecutor's informed discretion.") (citations omitted). Here, plaintiff argues that she was charged with crimes based upon a misleading Complaint Fact Sheet prepared by Micewski and submitted to the District Attorney. Even assuming that plaintiff's allegations are true, she still would not succeed on her §1983 claim based on malicious prosecution because she cannot prove that she suffered a "seizure", after she was arraigned.

Because plaintiff's malicious prosecution claim implicates the Fourth Amendment, the defendants' actions must have resulted in a "seizure" of plaintiff after her initial appearance before a judicial officer. "The Fourth Amendment right implicated in a malicious

prosecution action is the right to be free of unreasonable seizure of the person - i.e., the right to be free of unreasonable or unwarranted restraints on personal liberty. To maintain a §1983 claim for malicious prosecution under the Fourth Amendment, "the deprivation of liberty -- the seizure -- must have been effected 'pursuant to legal process.'" Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir. 1995) (quoting Heck v. Humphrey, 512 U.S. 477, 484 (1994)), cert. denied, 517 U.S. 1189 (1996). Generally, this "legal process" will be in the form of a warrant, in which case the arrest may constitute the seizure, or a subsequent arraignment, in which case any post-arraignment deprivations of liberty might satisfy the constitutional requirement of a seizure. Id. In this case, as in Singer, plaintiff's arrest cannot serve as the predicate deprivation of liberty because it occurred without a warrant and prior to the arraignment, and therefore was not pursuant to legal process.[8]

In this case, the charges were instituted against plaintiff by a complaint filed by the District Attorney the day after she was arrested. Plaintiff was notified of the charges and released that same day without having to post bail. (Req. for Admissions 4-7.) The bond plaintiff signed contained no conditions other than she appear in court as directed and to submit herself to all orders of the court. (Req. for Admissions Ex. 2.) The conditions of plaintiff's release never changed and she was never incarcerated again on the charges. (Req. for Admissions 8, 9.) Courts have held that these types of conditions do not constitute a "seizure" sufficient to establish a claim under Section 1983. See Gallo v. City of Philadelphia, 975

[8] Plaintiff had a preliminary arraignment and was released within 24 hours of her arrest. This time frame satisfies the promptness requirement of the Fourth Amendment as articulated by the Court in Gerstein v. Pugh, 420 U.S. 103 (1975). See County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

F.Supp. 723, 727-28 (E.D. Pa. 1997); Torres, 966 F.Supp. at 1364. In Torres, plaintiff was released on the same day he was arrested. His bond did not contain any travel restrictions. The plaintiff in Torres was required to appear in court for his preliminary hearings, arraignment, and trial. 966 F.Supp. at 1364. The court, considering his malicious prosecution claim under §1983 concluded that "[a]bsent any constitutionally-significant pretrial restraints on [plaintiff's] liberty, the weight of federal authority ... holds that [plaintiff] may not maintain a §1983 claim for malicious prosecution. " Id. (citing cases). The Supreme Court has stated that

> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. (citations omitted) We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty."

Gerstein v. Pugh, 420 U.S. 103, 1215 n.26 (1975). See also Gallo, 975 F.Supp. at 727, 731 (Plaintiff released on the following conditions: $10,000 own-recognizance bond, prohibited from traveling beyond Pennsylvania and New Jersey, and required to "check in" with Pretrial Services weekly; did not suffer restraints on liberty sufficient to constitute a "seizure" under the Fourth Amendment.) Consequently, plaintiff has not suffered a seizure sufficient to make a malicious prosecution claim under Section 1983, and judgment must be entered against plaintiff and in favor of defendants on her claim for malicious prosecution under §1983.

b. Arrest Without Probable Cause.

Plaintiff argues that her arrest was not supported by probable cause. Plaintiff was charged with possession of a controlled substance and possession of a controlled substance with intent to deliver. Plaintiff argues that nothing at the time of the arrest indicated that she knew the

drugs were under her seat cushion - i.e., she did not reside in the house, the chair was not usually accessible only to plaintiff, plaintiff did not attempt to escape, and she was never observed in prior drug related activity. Plaintiff further maintains that "[i]t was not reasonable for Defendant Micewski to conclude that Plaintiff had committed, or was committing, a crime, given the totality of the circumstances" and, therefore, plaintiff's arrest was without probable cause. (Pl.'s Resp. to Defs.' Mot. for Summ. J. at 14-15.) Defendants argue that judgment should be entered in their favor because plaintiff cannot prove that defendants lacked probable cause to arrest her.

> The general principles that govern this claim are well settled.
>
> > [T]he Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 ... (1972). Probable cause for arrest requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt. See United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir. 1984). Rather, probable cause for arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested. United States v. Cruz, 910 F.2d 1072, 1076 (3d Cir. 1990) (citing Dunaway v. New York, 442 U.S. 200, 208 n.9 ... (1979)).

Orsatti v. New Jersey State Police, 71 F.3d 480, 483 (3d Cir. 1995). See also Sharrar v. Felsing, 128 F.3d 810, 817-18 (3d Cir. 1997) (Probable cause is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'") (quoting Gerstein v. Pugh, 420 U.S. 103, 111 (1975)) (citation omitted). A court must look at the totality of the circumstances and use a common sense approach to the issue of probable cause. Id. at 818. Probable cause does not depend on the ultimate determination of guilt or innocence. Orsatti, 71 F.3d at 482-83.[9] Probable cause may

[9] See Draper v. United States, 358 U.S. 307, 312 (1959) ("There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals

even be based upon erroneous information if at the time of the arrest, a reasonable officer would not have known of the error. Illinois v. Rodriguez, 497 U.S. 177, 184 (1990).

"In a §1983 action the issue of whether there was probable cause to make an arrest is usually a question for the jury, but 'where no genuine issue as to any material fact exists and where credibility conflicts are absent, summary judgment may be appropriate.'" Sharrar, 128 F.3d at 818 (quoting Deary v. Three Un-Named Police Officers, 746 F.2d 185, 192 (3d Cir. 1984)). The question of probable cause is for the jury only "if there is sufficient evidence whereby a jury could reasonably find that the police officers did not have probable cause to arrest." Id. (citing Deary, 746 F.2d at 190.)

In the instant matter, the facts surrounding plaintiff's arrest are not in dispute. See infra pp. 2-5. No credibility determinations are required. Rather, plaintiff argues that defendants' motion for summary judgment should not be granted with respect to her Fourth Amendment claim because she was not in constructive possession of the narcotics found by defendant Micewski under the seat cushion of the chair on which she was seated and, therefore, her arrest was without probable cause. Plaintiff claims that constructive possession has been defined "as the power to control the contraband and the intent to exercise that control." (Pl.'s Mem. of Law Opp. Summ. J. at 13 (citing Commonwealth v. Macolino, 503 Pa. 201, 206 (1983)).[10] A prerequisite for intent to control is proof that the defendant knew of the existence

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which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." (citing United States v. Heitner, 149 F.2d 105 (2d Cir. 1945) (Hand, L., J.))

[10] Defendants agree with plaintiff's definition of constructive possession. (Defs. Mem. of Law Supp. Summ J. at 29.) This is a correct definition under Pennsylvania law. See generally Jackson v. Byrd, 105 F.3d 145, 148 (3d Cir. 1997).

and location of the narcotics. Plaintiff further argues that presence alone is insufficient to implicate a party in a crime of possession. She contends that no facts existed proving that she had knowledge of the narcotics: plaintiff did not reside in the house, the chair was not usually accessible only to plaintiff, she did not make any furtive movements or attempt to escape, she had not been observed in any other drug activity, and the narcotics were not visible until the cushion was removed. (Pl.'s Mem. of Law Opp. Summ. J. at 14.) Given these undisputed facts, plaintiff argues that it was unreasonable for defendant Micewski to conclude that she had committed, or was committing, a crime and, therefore, her arrest was without probable cause. Id. at 14-15.

Considering the same facts, defendants argue that a police officer could reasonably have believed that plaintiff was in constructive possession of the narcotics. Defendants argue that the following factors were evidence of knowing and intentional possession: proximity to the controlled substance, ready access to the controlled substance, a large degree of control over the area where the controlled substance was found, a large amount of controlled substance, packaging, cash, writings or paraphernalia consistent with an intentional activity, and observations of use or distribution activity at place where the controlled substance was found. Id. at 29-31 (citing cases).

In the instant matter, defendant Micewski witnessed a drug transaction at 2906 N. Mutter Street the day before plaintiff's arrest. The drug packets from that drug transaction were stamped "ATNT". The drug packets found under plaintiff's seat cushion were stamped "ATNT". Defendant Micewski also found cash and sheets of papers with names and numbers under the seat cushion. The denominations of the bills were consistent with the sale of bags of heroin at

$10.00 per bag. Defendant Micewski knew that at that time heroin sold at $10.00 per bag. (Micewski Decl. at ¶5.) Moreover, Micewski found $480.00 in cash in plaintiff's purse in small denominations that also were consistent with the sale of $10.00 bags of heroin. Defendants further maintain that by sitting on the drugs, a reasonable officer could think that she was preventing others from having access to the drugs, keeping them hidden, and keeping them safe from street sellers and addicts. Based upon the undisputed facts and the circumstances as they appeared to Micewski at the time he decided to arrest plaintiff, this court finds that probable cause existed for Micewski and the other defendant Agents to arrest plaintiff.[11] Consequently, summary judgment is granted in favor of defendants and against plaintiff with respect to her Fourth Amendment claim alleging arrest without probable cause.

G. State Law Claim - Malicious Prosecution.

Plaintiff has alleged a state law claim of malicious prosecution. The defendants have statutory immunity with respect to this claim. 1 Pa. Cons. Stat. Ann. §2310.[12] Inasmuch as defendants were acting within the scope of their duties as state employees or officers when they arrested and initiated prosecution against plaintiff, and plaintiff's claim does not fall within any category in which sovereign immunity is waived, defendants are protected by immunity in this matter. See Hawkins, 1998 WL 51290, at *2; LaFrankie v. Miklich, 152 Pa.Cmwlth. 163, 171-

[11] This court need not reach defendants' alternative argument that defendants have qualified immunity from plaintiff's Fourth Amendment claim.

[12] The governmental and sovereign immunity waivers set forth in 42 Pa. Cons. Stat. Ann. §8522(a)(b), being exceptions to the rule of immunity, are to be given narrow construction. Snyder v. Harmon, 522 Pa. 424, 433-34, 562 A.2d 307, 312 (1989).

72, 618 A.2d 1145, 1149 (1992). Accordingly, judgment will be entered in favor of the defendants and against plaintiff with respect to her state law claim for malicious prosecution.

For the reasons set forth above, summary judgment is granted in favor of the defendants and against plaintiff on all counts in the complaint. An appropriate order follows.

BY THE COURT:

_____

THOMAS J. RUETER
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEJITA ROMAN MARCIA	:	CIVIL ACTION
v.	:	
CHARLES MICEWSKI, et al.	:	NO. 97-5379

O R D E R

AND NOW, this 24th day of August, 1998, upon consideration of defendants' motion for summary judgment (Document No. 15), and plaintiff's response thereto, it is hereby **ORDERED** that the motion is **GRANTED**. Judgment is entered in favor of all defendants and against plaintiff on all counts of the complaint.

BY THE COURT:

_____
THOMAS J. RUETER
United States Magistrate Judge